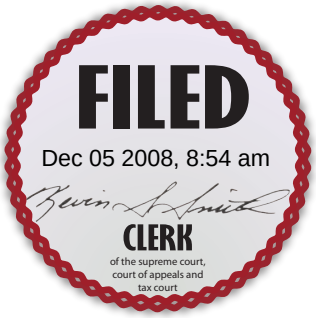

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IN THE COURT OF APPEALS OF INDIANA

MICHAEL B. ZALAT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0805-CR-232
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile A. Blau, Judge
Cause No. 10D02-0503-FB-127

December 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Michael Zalat appeals his sentence for possession of cocaine as a class B felony[1] and possession of oxycontin as a class C felony.[2] Zalat raises two issues which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing him; and

II. Whether Zalat's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On February 16, 2005, Zalat knowingly or intentionally possessed cocaine and oxycodone or oxycontin within one thousand feet of Bob Hedge Park, a public park in Jeffersonville, Indiana. In March 2005, the State charged Zalat with possession of cocaine as a class B felony and possession of a controlled substance as a class C felony. On November 16, 2005, Zalat pled guilty as charged and entered an "Agreement To Enter Into Drug Court."[3] Appellant's Appendix at 35. The trial court accepted Zalat's guilty plea and deferred finding any convictions and sentencing for the purpose of admitting Zalat into the drug court program. On December 20, 2006, May 31, 2007, and November 16, 2007, the trial court issued arrest warrants for Zalat because

[1] Ind. Code § 35-48-4-6 (2004) (subsequently amended by Pub. L. No. 151-2006, § 24 (eff. July 1, 2006)).

[2] Ind. Code § 35-48-4-7 (2004).

[3] The record does not contain a copy of this agreement.

probable cause existed that Zalat had violated the drug court agreement. On November 29, 2007, Zalat was terminated from drug court.

At the sentencing hearing, the trial court stated:

> First of all, in regards to the comments of all the witnesses today and [Zalat]'s comments. [Zalat], I think your parents are correct in that you do have lots of abilities. I think they're also correct you're a great manipulator. And it's a skill that you can use or abuse and you are a classic abuser of it. You can work it and I say that with a smile because if you know how to do it you can be charming and get jobs and make friends and do all sorts of good things. When you use it for the wrong purpose it's like a second disease. It makes that addiction that much more fatal. So I think you are right based upon your comments, Drug Court probably did save your life. You know, it's going to be up to you from this point forward whether you did earn the tools. I think you were given the tools. I think you have the choices for the tools. I'm not quite convinced you've given yourself totally up so that somebody else or a greater power is going to make the difference in your life. I think you want to do that sometimes and other times you don't. And I do think, and I do appreciate your mentioning the Drug Court because I think it did make a difference. I think it advised you of choices you could make. And if I'm taking a look at aggravators and mitigators depending on what the situations are. I appreciate the State proposing those sentences be run concurrent because quite honestly I have to agree a little bit with [Zalat's attorney]. I did go back and read the police report. I did go back and try to figure out what we did with your co-conspirator. I have him Visiting a Common Nuisance. And so there's a certain fairness in this situation. The bad thing about your situation, you were in a place you chose to be, you just got caught. And whether the end results were fair or not is almost irrelevant because you put yourself in the position of getting caught in a big mess. On the other hand, I have to agree again with [Zalat's attorney], what you came in on Drug Court could have been a lesser offense. Now it isn't and when we brought you into Drug Court that twenty-eight years hanging over your head, because I asked you several times during Drug Court do you understand, do you know how many years you have hanging over. So you were aware of that but I'm not so sure you really realized it. I have this as your first felony conviction. That certainly is not anything to be excited about but it is something when I

> take a look at your whole criminal record you're not an axe murderer. And so the Court will take that into account. You are young. At the day of termination you, you did thank Drug [sic] Court then at a time when you could have been a little bit bitter and outspoken and I appreciated the fact you weren't. Now whether that was being manipulative or not that point is irrelevant to me because it was appropriate at that time. You did endure Drug Court for two years and the Court takes that into consideration. It's not easy. We don't intend for it to be easy. You're young. I take that as a mitigating factor. You have no children and I really appreciate that because some people sitting in your seat have children and then we've got to figure out what to do with them. And while they should be considered kind of a mitigating factor I don't always consider that because if you bring children into the world you're responsible for them. And you've kind of screwed them up if you bring them into the world and you find yourself in this position. So the Court taking a look at the total situation, having reviewed the Pre-Sentence Investigation Report, having tried to take a look at the total packages and the services and, and you are right. You went through about every resource we had plus more. We really didn't have any place else to put you.

Transcript at 60-63.[4] The trial court sentenced Zalat to ten years for possession of cocaine as a class B felony with eight years executed in the Indiana Department of Correction and two years in the Clark County Work Release Program. The trial court sentenced Zalat to four years for possession of a controlled substance in the Indiana Department of Correction. The trial court ordered that the sentences be served concurrently.

I.

[4] The trial court did not include any aggravating or mitigating factors in its sentencing order.

The first issue is whether the trial court abused its discretion in sentencing Zalat.[5] Zalat argues that the trial court's sentencing statement was not sufficient because it did not specifically identify any aggravating factors at sentencing. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). We note that the trial court imposed presumptive sentences. Generally, the imposition of a presumptive sentence does not obligate the trial court to provide a detailed sentencing statement. Jackson v. State, 728 N.E.2d 147, 154-155 (Ind. 2000). Here, the trial court identified at least one mitigating factor, Zalat's age,[6] and thus was required to state its reasons for imposing the sentence it did. Id. at 155. This requirement is intended to ensure that the trial court considered proper matters in determining the sentence and facilitates meaningful appellate review of the reasonableness of the sentence. Id.

[5] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Zalat committed his offense prior to the effective date and was sentenced after April 25, 2005. We apply the version of the sentencing statutes in effect at the time Zalat committed his offenses. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (noting that "[h]ad the new [sentencing] statute become effective between the date of [a defendant]'s crime and his sentencing, the version of the statute in effect at the time of [a defendant]'s crime would have applied"); see also Padgett v. State, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007) (reviewing the defendant's sentencing under the presumptive sentencing scheme when defendant committed his crime before the effective date of the new sentencing scheme, but was sentenced after this date) trans. denied.

[6] Zalat was born on December 10, 1985.

The State concedes that the trial court did not explicitly identify aggravators, but argues that the trial court's comments at the sentencing hearing are sufficient. Specifically, the State argues that the trial court found Zalat's criminal history as an aggravator. At the sentencing hearing, the trial court stated, "I have this as your first felony conviction. That certainly is not anything to be excited about but it is something when I take a look at your whole criminal record you're not an axe murderer. And so the Court will take that into account." Transcript at 62. From the trial court's comments it is unclear whether the trial court considered Zalat's criminal history as an aggravator or a mitigator.

The trial court also mentioned Zalat's manipulative nature. Specifically, the trial court stated:

> [Zalat], I think your parents are correct in that you do have lots of abilities. I think they're also correct you're a great manipulator. And it's a skill that you can use or abuse and you are a classic abuser of it. You can work it and I say that with a smile because if you know how to do it you can be charming and get jobs and make friends and do all sorts of good things. When you use it for the wrong purpose it's like a second disease. It makes that addiction that much more fatal.

Id. at 60. Based on the trial court's comments, we conclude that the trial court found Zalat's manipulative nature as an aggravator. See Brown v. State, 698 N.E.2d 779, 781 (Ind. 1998) (holding that, although the trial court failed to "neatly package" aggravating circumstances in the sentencing order, the record demonstrated that the trial court considered the circumstances of the crime in ordering the sentences to be enhanced and

served consecutively); Creekmore v. State, 853 N.E.2d 523, 529 (Ind. Ct. App. 2006) (declining to adopt defendant's "magic words" approach in determining whether the trial court identified a sufficient aggravating factor), clarified on denial of reh'g, 858 N.E.2d 230; Perry v. State, 845 N.E.2d 1093, 1096-1097 (Ind. Ct. App. 2006) (holding that, although the sentencing statement was not precisely worded, the trial court's thought process was clear and adequate), trans. denied.

Zalat argues that the trial court's mention of his manipulative nature "was not connected in any manner to the circumstances surrounding Zalat's arrest. It may be the trial court was merely agreeing with Zalat's parents who had explained their struggles as they attempted to help their son overcome his addiction problems." Appellant's Brief at 14. The trial court expressed the relation between Zalat's manipulative nature and the offense by saying that when Zalat uses his manipulative nature "for the wrong purpose it's like a second disease. It makes that addiction that much more fatal." Transcript at 60. Thus, we cannot say that the trial court abused its discretion by considering Zalat's manipulative nature as an aggravator. See, e.g., Willsey v. State, 698 N.E.2d 784, 796 (Ind. 1998) ("The trial court's list of aggravating circumstances, including its emphasis on Willsey's manipulative and calculating behavior, does not demonstrate an abuse of discretion."), reh'g denied.

Zalat also argues that the trial court abused its discretion by failing to consider his guilty plea as a mitigating factor. "The finding of mitigating factors is not mandatory and

rests within the discretion of the trial court." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

The Indiana Supreme Court has held that "a defendant who pleads guilty deserves 'some' mitigating weight be given to the plea in return." Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) ("Anglemyer Rehearing") (quoting McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007)). However, "an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." Id. at 220-221. The significance of a guilty plea as a mitigating factor varies from case to case. Id. at 221. "For example, a guilty plea may not be significantly mitigating when it

does not demonstrate the defendant's acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea." Id. (citing Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, the trial court stated:

> On the other hand, I have to agree again with [Zalat's attorney], what you came in on Drug Court could have been a lesser offense. Now it isn't and when we brought you into Drug Court that twenty-eight years hanging over your head, because I asked you several times during Drug Court do you understand, do you know how many years you have hanging over. So you were aware of that but I'm not so sure you really realized it. . . . You did endure Drug Court for two years and the Court takes that into consideration. It's not easy. We don't intend for it to be easy.

Transcript at 61-62. Based on the trial court's comments, we conclude that the trial court did not overlook Zalat's guilty plea. Moreover, we cannot say that Zalat's guilty plea is significant because, in exchange for his plea, Zalat was offered the opportunity to complete the drug court program and avoid sentencing for his offenses. Given the significant benefit that Zalat received, namely the opportunity to complete the drug court program and avoid sentencing as a result of the plea agreement, we conclude that the trial court did not abuse its discretion. See Debro v. State, 821 N.E.2d 367, 372 (Ind. 2005) ("The agreement Debro reached with the State provided him with a significant benefit: the possibility of no criminal conviction for his admitted criminal conduct."); Sensback, 720 N.E.2d at 1165.

In summary, the trial court identified Zalat's manipulative nature as an aggravator and did not abuse its discretion by giving this aggravator some weight. The trial court did not overlook Zalat's guilty plea and did not abuse its discretion by not finding Zalat's guilty plea to be a significant mitigating factor. Consequently, we cannot say that the trial court abused its discretion in sentencing Zalat to the presumptive sentence of ten years for possession of cocaine as a class B felony with eight years executed and two years on work release and the presumptive concurrent sentence of four years for possession of a controlled substance.

II.

The next issue is whether Zalat's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Zalat requests this court to reduce his sentence.

Our review of the nature of the offense reveals that Zalat knowingly or intentionally possessed cocaine and oxycodone or oxycontin within one thousand feet of Bob Hedge Park, a public park in Jeffersonville, Indiana. Zalat points to the police report which reveals that Jeffersonville Police Detective Lawhorn received information that

Brandon Head would be traveling to Louisville to pick up oxycontin. Detective Lawhorn observed Head and Zalat leave Lawhorn's residence and travel to the Louisville area. Head and Zalat spent twenty-five minutes in an apartment in the Louisville area and then left the apartment. Corporal Ron Todd initiated a traffic stop on the vehicle. The police searched Head but did not find anything. A search of Zalat revealed a prescription bottle in the "underwear area in the rear of [Zalat's] pants," which contained "a quantity of 20 milligram [sic] of Oxycontin, a small amount of crack cocaine and one (1) 30 milligram Oxycontin pill." Appellant's Appendix at 12. The prescription bottle had a label on it for Head. Zalat told the police that Head gave him the bottle during the initial traffic stop and that passengers are normally given one pill to hide the contraband if stopped. Head told police that he went to the Louisville area and picked up the supply of Oxycontin but the pills were not his.

Zalat argues that the facts found in the police report "certainly suggest the pills and coke found in the prescription bottle belonged to the driver and that Zalat was only holding the merchandise for the driver after they were stopped by the police." Appellant's Brief at 18. Zalat also argues that "it would appear patently unfair that Zalat had to plead to both a B and C felony to have the opportunity to participate in a drug court program, and then received a ten year executed sentence when he failed to successfully complete the program when his co-defendant was able to secure a plea to a class B misdemeanor." Appellant's Brief at 19. We cannot compare Zalat's sentence

with Head's sentence because Zalat possessed the drugs and the record does not contain Head's criminal history or any other information relating to Head's sentence.

Our review of the character of the offender reveals that Zalat pleaded guilty and entered drug court but was unsuccessful in completing the program. As a juvenile, Zalat was charged with leaving home, disobedience, and possession of alcoholic beverages. Also as a juvenile, Zalat was charged with possession of marijuana and received a suspended sentence. As an adult, Zalat pled guilty to leaving the scene of an accident as a class C misdemeanor and his sentence was suspended to probation.

After due consideration of the trial court's decision, we cannot say that Zalat's presumptive sentence of ten years for possession of cocaine as a class B felony with eight years executed and two years on work release and the presumptive concurrent sentence of four years for possession of a controlled substance is inappropriate in light of the nature of the offense and the character of the offender.

For the foregoing reasons, we affirm Zalat's sentence for possession of cocaine as a class B felony and possession of oxycontin as a class C felony.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur